IN THE HIGH COURT OF SINDH
CIRCUIT COURT MIRPURKHAS

Crl. Misc. Application No.S-472 of 2024
(*Muhammad Yar vs. The State and Another*)

DATE ORDER WITH SIGNATURE OF JUDGE

Date of hearing & Order 29-08-2024.

M/s Muhammad Sachal Awan and Kanji Mal Meghwar, advocates for the applicant.
Mr. Dhani Bakhsh Mari, Assistant Prosecutor General Sindh.

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ORDER

Adnan-ul-Kareem Memon, J. The applicant Muhammad Yar, has filed a Criminal Miscellaneous Application challenging the order dated 15-07-2024 passed by the Civil Judge and J.M-I, Mithi. This order referred the case to the S.S.P, Tharparkar @ Mithi, along with the police file, directing them to proceed as per the law on the premise that the investigating officer (I.O) submitted his report under section 173 Cr. P.C., recommending the disposal of the case under "C" class, however, the learned Magistrate decided to refer the matter to the S.S.P., on the purported analogy that there might have been some inconsistencies or additional evidence that prompted him to take this action.

2. The facts of the case are that the complainant, Mohan, lodged the FIR at PS Mithi on 09-04-2024, alleging that Muhammad Yar had blackmailed, sexually assaulted, and threatened his brother, Amrat, and other classmates. It is alleged that Muhammad Yar allegedly sent inappropriate messages and harassed Amrat and his classmates, threatening to release explicit videos of them if they did not comply with his demands. He also forced Amitab to have unnatural sexual intercourse at gunpoint. Due to these threats and the traumatic incident, Amrat and his classmates were afraid to attend college or show their faces in the city. They eventually identified Muhammad Yar as the person behind the harassment and threats. The complainant appeared at PS Mithi and lodged the subject FIR based on his brother's account of the events. During the investigation the case was recommended under C class, however, the learned Magistrate vide impugned order referred the matter to SSP for further action under the law.

3. The crux of the findings of the trial court prima facie suggests that JIT violated the mandatory provisions of sections 164-A and 164-B Cr. P.C. by failing to conduct medical examinations of the victim and accused and collect DNA samples. JIT recorded statements and collected evidence, but it failed to gather certain crucial pieces of evidence, such as the alleged viral video and the CDRs of mobile numbers involved. JIT did not prepare a memo for the screenshots/photographs collected and failed to collect the mobile phones of the accused and victims.

4. The trial Court, however, raised the question of whether it had jurisdiction to decide the case, as the alleged offenses involved electronic devices and fell within the domain of cybercrime. After reviewing relevant case law, the trial court concluded that he was competent to decide the case. However, the findings of the court were referred to the Superintendent of Police, Tharparkar at Mithi, with directions to act under the PECA Act 2016. The trial Court also directed the Inspector General of Police, Sindh, to take action against the delinquent officials of the JIT for their failure to follow legal procedures.

5. This Court has previously issued notices to the respondent and the learned Additional Public Prosecutor (A.P.G) to appear and assist the court in determining whether the Magistrate had the authority to refer the matter to the S.S.P under the PECA Act, 2016, especially given the victim's statement refuting the prosecution case and the I.O's recommendation for disposal under the "C" class. However, the respondent is not turning up despite the service of notice by this court vide order dated 15.8.2024.

6. The learned counsel for the applicant is challenging the impugned order dated 15-07-2024 passed by the Judicial Magistrate-I, Mithi, on the ground that the impugned order is illegal, unlawful, ab initio, not sustainable, null and void, and hence, liable to be set aside; he points to the statement of the victim recorded under section 164 Cr. P.C. and argued that no offense under section 377 has been committed. He highlights that the Joint Investigation Team (JIT) concluded that no act of rape was committed by the applicant, and the learned Magistrate failed to appreciate this. He argues that the JIT's final report under section 173 Cr. P.C. negated the contents of the FIR and found that the applicant only pressurized and threatened the victim, making the impugned order

unsustainable. The learned counsel contends that the Magistrate erred in observing that the JIT violated these provisions, as the victim's denial of the incident made conducting a Medico-Legal Examination illogical. The counsel asserts that the prosecution failed to establish its case from the very beginning, and the Magistrate should have declined cognizance.

7. The learned A.P.G. argued that since the matter had already been ordered to be taken up by the S.S.P. under the PECA Act, no further action is required by this Court to interfere.

8. I have heard the learned counsel for the parties present in court and perused the record with their assistance.

9. Before touching on the merits of the case, it is found quite appropriate first to discuss the difference between the role of the investigating officer and that of the learned "*Magistrate*" in relation to the investigation and outcome thereof. Every investigation is to be conducted as per *the Criminal Procedure Code* and the Police Rules. The *vitality* of the role of the investigating officer cannot be denied because it is the very *first* person, who per law, is authorized to dig out the truth which, *too,* without any limitation including that of the *version* of informant / complainant. Without saying more in that respect the authoritative view of the Supreme Court is given in the case of Mst. Sughran Bibi Vs. The State **(PLD 2018 SC-595),** whereby certain legal position(s) are declared. Out of which, some being relevant, are reproduced hereunder:-

> (iv) During the investigation conducted after the registration of an FIR the investigating officer may record any number of versions of the same incident brought to his notice by different persons which versions are to be recorded by him under section 161 Cr.PC in the same case. **No separate FIR is to be recorded for any new version of the same incident brought to the notice of the investigating officer during the investigation of the case;**
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> (v) During the investigation the investigating officer is obliged **to investigate the matter from all possible angles while keeping in view all the versions of the incident brought to his notice** and, as required by Rule 25.2(3) of the Police Rules 1934 "It is the duty of an investigating officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person."
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> (vi) …….
>
> (vii) Upon conclusion of the investigation the report to be submitted under section 173 Cr.PC is to be based upon **the actual facts** discovered during **the investigation** irrespective of the version of

> the incident , **advanced by the first informant or any other version brought to the notice of the investigating officer by any other person**.

10. From above, it is quite clear that an investigating officer is not bound to base his conclusion on the version of the *informant* or *defence* but on *'actual facts, discovered during course of investigation'*. Such conclusion shall be submitted in the shape of a prescribed form, as required by Section 173 of the *Criminal Procedure Code.* At this juncture, it would be relevant to refer to the provision of Section 173 of the Criminal Procedure Code, which reads as under;

> "**173 (1) Report of Police Officer.** Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the Officer Incharge of the police station shall through the public prosecutor---.
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> **(a)** forward to a Magistrate empowered **to take cognizance of the offence on a police report**, in the form prescribed by the Provincial Government, setting forth the names of the parties, the nature of the information and the names of the, persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and
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> **(b)** communicate, in such manner as may be prescribed by the Provincial Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.
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> (2) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the Provincial Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the Officer Incharge of the police station to make further investigation.
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> (3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for **the discharge of such bond or otherwise as he thinks fit**.

11. The bare perusal of the above section would show that it directs that on conclusion of every investigation, a police report shall be forwarded to the Magistrate having jurisdiction, so empowered to take cognizance thereon which must include all details. It no-where describes as to how the Magistrate shall deal with such a report. It however empowers the Magistrate to agree or disagree with the opinion/act of the Investigating Officer in releasing an accused during investigation u/s 497 Cr.PC, which, *too,* to the extent of discharge of bonds. Since in Cr.P.C, this Chapter no-where provides duties/powers of the Magistrate to deal with such forwarded reports, therefore, section 190 Cr.P.C thereof, being relevant, is referred to which reads as under;

> "**Section 190**. **Cognizance of offences by Magistrates.** All Magistrates of the first class, or any other Magistrate specially

empowered by the Provincial Government on the recommendation of the High Court **may** take cognizance of any offence;

> **(a)** upon receiving a complaint of facts which constitute such offence.
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> **(b)** upon a report in writing of such facts made by any Police officer,
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> **(c)** upon information received from any person other than a police officer, or upon his own knowledge or suspicion".

12. In the above section, the word 'may' has been used which always vests competence to agree or disagree with the police report u/s 173 Cr. PC**.** This is the reason for the legally established principle of the Criminal Administration of Justice that an opinion of the investigating officer is never *binding* upon the Magistrate dealing with report, forwarded under section 173 of Criminal Procedure Code. In the case of *Muhammad Akbar v. State* **(1972 SCMR 335),** it has been observed that;

> "Even on the first report alleged to have been submitted under section 173, Cr.PC, the Magistrate could, irrespective of the opinion of the Investigating Officer to the contrary, take cognizance, if upon the materials before him he found that a prima facie case was made out against the accused persons. After all the police is not the final arbiter of a complaint lodged with it. It is the Court that finally determines upon the police report whether it should take cognizance or not in accordance with the provisions of section 190(i)(b) of the Code of Criminal Procedure. This view finds support from a decision of this Court in the case of Falak Sher v. State (PLD 1967 SC-425). "

13. Even under the sub-section (3) of section 190 of the Criminal Procedure Code, a Magistrate who takes cognizance of any offence under any of the clauses of sub-section (1) of that section is required to apply his mind in order to ascertain as to whether the case is one which he is required to 'send' for trial to the Court of Session or whether it is one which he can proceed to try himself. It must always be kept in view that an act of taking cognizance has nothing to do with the guilt or innocence of the accused but only shows that the Magistrate concerned has found the case worth trying, therefore, the Magistrate should never examine the matter in deep but only to make *prima facie* assessment of the facts about the commission of the offense or otherwise. Once the Magistrate has taken cognizance of the offence exclusively triable by the Court of Session, he has to send the case to that Court.

14. It would further be added here that taking cognizance shall not prejudice the right of the accused but rests the burden upon the prosecution to prove its charge without any harm to the presumption of

innocence of the accused involved in the offense. Even otherwise, it is by now settled that cognizance is taken against offense and not against the accused. However, at the same time, if a tentative examination of available material shows *prima facie* commission of a cognizable offense *last* justifies proceeding further with the case then a criminal case *normally* cannot be disposed of under **'B'** or **'C'** class based on the recommendation of the police and the Magistrate can direct for further investigation on the points so, found out by the Court.

15. However, in the present case, the investigating officer believed that the case was liable to be disposed of under "C" class coupled with the victim's statement under section 164 Cr.P.C. categorically denying any rape, thus there was no justification for the Magistrate to direct the S.S.P, under the PECA Act to take steps as it was beyond his jurisdiction to proceed with the matter when the offense was/is not triable by him for the simple reason that if the direction is supposed to be complied with then the S.S.P shall not be in a position to place the case before the competent court functioning under PECA Act as there is no such direction to return the report to be placed before the concerned court under the PECA Act in absence of such concrete material the Magistrate's direction is of no consequences, as the complainant party and victim are reluctant to prosecute the accused due to their statement under section 164 Cr. P.C before the Magistrate in such a scenario, it is not safe to order for re/further investigation of the case and/or to send the case to SSP for appropriate action against J.I.T or the delinquent police officials. Once the case is disposed of under "C" class, the concrete material should be with the Magistrate to disagree with the report to take cognizance, if at all he finds some material, he can simply direct for further investigation so that such evidence be brought on record for taking cognizance, which material in the present case is altogether, missing. Thus, no further action is required under the Cr.P.C.

16. In these circumstances the impugned order dated 15-07-2024 to the extent of the direction to the S.S.P Tharparkar @ Mithi is not sustainable under the law and is set aside.

JUDGE